Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

AIRMAN JASON W. HALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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July 2002

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QUESTION PRESENTED

Whether it was constitutional error to prevent petitioner from exercising his Sixth Amendment right to put on a complete entrapment defense?[1]

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[1] The question presented before the Court of Appeals for the Armed Forces was styled as "Whether the Air Force Court of Criminal Appeals abused its discretion when it held that although the military judge erred in his decision not to admit A1C Gilbert's testimony, the error was harmless beyond a reasonable doubt?" The substance of petitioner's claim remains the same.

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The petitioner, Airman Jason W. Hall, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 2 May 2002.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Hall*, 56 M.J. 432 (2002) is located at Appendix B. The published opinion of the United States Air Force Court of Criminal Appeals (54 M.J. 788 (2001)) is located at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 2 May 2002.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "...the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall...be deprived of life, liberty, or property, without due process of law."

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[2] Appendix B, p. 2a.

STATEMENT OF THE CASE

Proceedings below:

On September 17-18, 1998, Airman Hall was tried by a general court-martial before a panel of officer members. Airman Hall pled guilty to two specifications of assault consummated by a battery and one specification of dereliction of duty. Despite his not guilty plea to wrongful distribution of anabolic steroids, Airman Hall was found guilty of that offense. He was sentenced to confinement for twelve months and reduction to the grade of airman basic.

On November 25, 1998, the Convening Authority[3] approved the sentence as adjudged and credited Airman Hall with ninety-three days for pretrial confinement.

On February 5, 2001, the Air Force Court of Criminal Appeals issued a decision affirming the findings and sentence. *United States v. Hall*, 54 M.J. 788 (A.F.Ct.Crim.App. 2001)(Appendix C)

On July 13, 2001, the United States Court of Appeals for the Armed Forces granted review on the following issue (Appendix A):

> Whether the Air Force Court of Criminal Appeals abused its discretion when it held that although the military judge erred in his decision not to admit A1C Gilbert's testimony, the error was harmless beyond a reasonable doubt.

On May 2, 2002, the United States Court of Appeals for the Armed Forces affirmed the lower court decision. *United States v. Hall*, 56 M.J. 432 (2002) (Appendix B).

Facts:

Airman Hall and Senior Airman Stachum - a government informer working for the Office of Special Investigations

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[3] The Convening Authority is the commander who convenes a court-martial.

(OSI) - lived in the same Security Forces dormitory. Both were avid weight lifters who frequently discussed dietary supplements used by weight lifters, to include anabolic steroids.

At trial, Senior Airman Stachum denied ever asking Airman Hall to get steroids for him. Airman Hall, however, testified that Stachum kept "bugging" him for steroids. After the prosecution impeached Airman Hall's credibility, the defense sought to introduce Airman First Class Gilbert's testimony.

Airman First Class Gilbert would testify that he overheard Stachum ask Airman Hall "can you hook me up" followed by Airman Hall's statement to Airman First Class Gilbert that Stachum "keeps bugging me for steroids."

The military judge ruled Airman First Class Gilbert's testimony inadmissible. The Air Force Court of Criminal Appeals disagreed. It found Gilbert's testimony "logically relevant" because it demonstrated that the "suggestion to commit the offense originated with SrA Stachum" and "went "directly to the heart of the appellant's entrapment defense." Still, the Air Force court deemed the exclusion of this evidence harmless error.

The Court of Appeals for the Armed Forces affirmed the decision below. The Court of Appeals for the Armed Forces opined that the Government's evidence was strong on the question of entrapment. Specifically, it held that the government was not required to show that the appellant was generally predisposed to sell drugs but only that he was predisposed to facilitate this transaction.

Dissenting from the majority opinion, the Honorable Judge Effron noted that the evidence relied on by the majority was ambiguous at best on the issue of whether the appellant was predisposed to distribute steroids. Judge Effron was not convinced beyond a reasonable doubt that Airman Hall was predisposed to distribute steroids absent the government agent's three-month campaign of inducement.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Armed Forces is in conflict with this Honorable Court's decision in *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535 (1991).

In *Jacobson*, after the Child Protection Act of 1984 made it illegal to receive sexually explicit depictions of children through the mail, two government agents solicited Jacobson to order child pornography. He answered a letter about child pornography and then ordered a magazine that depicted boys engaged in sexual activity. He was arrested after a controlled delivery of a photocopy of the magazine was made to his house. A search of his home revealed no materials other than those sent by the government agents. At trial, Jacobson asserted the entrapment defense. He was convicted and the Court of Appeals affirmed.

This Honorable Court reversed the conviction finding that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that Jacobson was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails. *Id.* at 554.

In its decision below, the United States Court of Appeals for the Armed Forces concluded that the exclusion of A1C Gilbert's testimony was harmless beyond a reasonable doubt because it believed there was sufficient evidence to show Senior Airman Hall's predisposition to facilitate the transaction. However, the evidence did not establish beyond a reasonable doubt that Senior Airman Hall was independently predisposed to distribute steroids prior to his contact with Stachum. In fact, the evidence supports the contrary: Airman Hall's best friend, Airman Hillhouse, testified that Airman Hall never offered to get him steroids even after Airman Hall knew that Airman Hillhouse wanted to try steroids.

In his dissenting opinion, Judge Effron took issue with the military judge's decision to deny Airman Hall the opportunity

to present evidence "that goes to the heart" of his entrapment defense. (Appendix B, p. 16a.) Judge Effron also disagreed with the majority's position that Airman Hall was predisposed to obtain steroids but lacked the funds to do so. Finally, relying on this Honorable Court's holding in *Jacobson v. United States*, 503 U.S. at 549 n.2., Judge Effron wrote that the "Government did not prove, that absent Stachum's three-month campaign of inducement, or prior thereto, appellant nonetheless would have engaged in the criminal conduct for which he was convicted, illegal distribution of steroids, in order to obtain steroids for his own personal use."

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces represents a departure from this Honorable Court's holding in *Jacobson v. United States*, 503 U.S. 540 (1992).

Therefore, Airman Hall respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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July 2002

Appendix A

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,	)	USCA Dkt. No. 01-0418/AF
	)	Crim.App. No. 33476
Appellee	)	
	)	
v.	)	ORDER GRANTING REVIEW
	)	
Jason W.	)	
HALL [*SSAN omitted*]	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 13th day of July, 2001,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ABUSED ITS DISCRETION WHEN IT HELD THAT ALTHOUGH THE MILITARY JUDGE ERRED IN HIS DECISION NOT TO ADMIT A1C GILBERT'S TESTIMONY, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Briefs will be filed under Rule 25.

For the Court,

/s/ James T. Harper
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (FRIED)
Appellate Government Counsel (ROMER)

Appendix B

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,	)	USCA Dkt. No. 01-0418/AF
	)	Crim.App. No. 33476
Appellee	)	
	)	
v.	)	JUDGEMENT
	)	
	)	
Jason W.	)	
HALL [*SSAN omitted*]	)	
Appellant	)	

This cause came before the Court on appeal from the United States Air Force Court of Criminal Appeals and was argued by counsel on October 25, 2001. On consideration thereof, it is by the Court, this 2nd day of May, 2002,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES, Appellee

V.

Jason W. HALL, Airman
U.S. Air Force, Appellant

No. 01-0418
Crim. App. No. 33476

United States Court of Appeals for the Armed Forces

Argued October 25, 2001
Decided May 2, 2002

GIERKE, J., delivered the opinion of the Court, in which CRAWFORD, C.J., and BAKER, J., joined. SULLIVAN, S.J., filed an opinion concurring in part and in the result. EFFRON, J., filed a dissenting opinion.

Counsel

For Appellant: *Major Maria A. Fried (argued); Lieutenant Colonel Beverly B. Knott and Lieutenant Colonel Timothy W. Murphy (on brief); Colonel James R. Wise and Major Stephen P. Kelly.*

For Appellee: *Captain Christa S. Cothrel (argued); Colonel Anthony P. Datillo and Major Lance B. Sigmon (on brief); Major Bryan T. Wheeler and Major Linette I. Romer.*

Military Judge: Gregory E. Michael

Judge GIERKE delivered the opinion of the court.

A general court-martial convicted appellant, pursuant to his pleas, of assault consummated by a battery (two specifications) and dereliction of duty, in violation of Articles 128 and 92, Uniform Code of Military Justice, 10 USC §§ 928 and 892, respectively. Contrary to his pleas, the court-martial, composed of officer and enlisted members, convicted appellant of unlawful distribution of anabolic steroids, in violation of Article 112a, UCMJ, 10 USC § 912a. The

adjudged and approved sentence provides for confinement for twelve months and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 54 M.J. 788 (2001). This Court granted review of the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ABUSED ITS DISCRETION WHEN IT HELD THAT ALTHOUGH THE MILITARY JUDGE ERRED IN HIS DECISION NOT TO ADMIT A1C GILBERT'S TESTIMONY, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

For the reasons set out below, we affirm.

Factual Background

The factual issue in this case was entrapment. The excluded testimony of Airman First Class (A1C) Richard Gilbert was offered in support of appellant's entrapment defense.

Senior Airman (SrA) Donald Stachum, an Air Force Security Policeman, testified that he and appellant lived in the same dormitory. Both Stachum and appellant were interested in weight lifting. They had conversations about certain professional weight lifters who used steroids and the effects they experienced. Appellant showed Stachum a "steroid handbook" and told him that he had learned a lot about steroid use from the book. Appellant offered to loan the book to Stachum, and Stachum accepted.

Stachum testified that sometime in mid-June 1998, appellant told him that he was "really cool" and offered to "connect [him] with a source." Stachum testified that he never asked appellant to sell steroids to him. Stachum reported appellant's offer to an agent of the Office of Special Investigations (OSI).

Stachum testified that around the end of June, appellant told him that he had a friend who might be able to obtain some steroids for him. Stachum reported this conversation to the OSI. The OSI told Stachum to keep them informed.

Around the first of July, appellant told Stachum that his friend was probably willing to sell the steroids, but he was hesitant and did not want to get into trouble. Stachum told appellant to let him know if the friend wanted to make the sale. Stachum reported this conversation to the OSI. On about July 8, the OSI arranged for Stachum to make a controlled buy.

Stachum testified that on the afternoon of July 8, he asked appellant if he had talked to his friend. Appellant responded that he would talk to his friend on the following morning. At about 4:30 p.m. on July 9, appellant told Stachum, "[I]f you want to buy the steroids, it has to happen at 1900 hours tonight." Appellant told Stachum that "[h]is friend was extremely paranoid, wanted to get rid of it, and didn't want to use it anymore." Stachum testified that he tried to postpone the transaction until the following morning, but appellant insisted "no, if it's going to happen, it has to happen tonight." Appellant wanted to conduct the transaction in the dormitory, and he wanted Stachum to "take a shot of the steroids to prove that [he] wasn't going to bust him."

The OSI told Stachum that the transaction could not be in the dormitory, because they would be unable to keep constant surveillance. Stachum told appellant that he did not want to conduct the transaction on base, that he did not trust him, and that he felt more comfortable off base.

Stachum testified that appellant told him he wanted to use the steroids with him for a week. Stachum replied that he would bring them to the dormitory but would not leave them in his dormitory room. Appellant reiterated that he wanted Stachum to "take a shot" immediately after the transaction. Stachum testified that appellant told him one of the

conditions for the transaction was that appellant could use them.

The transaction ultimately took place off-base, behind a church, where Stachum purchased the steroids with $120 in marked money. As Stachum and appellant drove toward the base, Stachum signaled the OSI. The OSI surrounded their vehicle, ordered both appellant and Stachum to get out of the vehicle, and handcuffed them.

A1C Phillip Hillhouse, a close friend of appellant, was the source of the steroids. He testified that he purchased them in his hometown. He testified that when he told appellant he intended to buy some steroids, appellant indicated that "if he had money, he would probably want me to buy some." Hillhouse qualified the last statement, testifying, "I don't have the 100% prove [sic] on that though."

Hillhouse had only "basic knowledge" about steroid use, but found that appellant was "very knowledgeable." Appellant verified that Hillhouse had purchased the correct size syringes, and he showed Hillhouse how to correctly inject himself with the steroids.

After using steroids for about two-and–a-half weeks, Hillhouse became "totally disgusted" with what he was doing to himself and decided to get rid of them. He offered to sell them to appellant. According to Hillhouse, "obviously he wanted them." Appellant offered to buy them and suggested a price of $120. Hillhouse agreed.

Appellant did not pay Hillhouse for the steroids immediately. Hillhouse did not know how appellant intended to obtain the money to buy the steroids, and he did not know if appellant intended to sell them. He understood that appellant wanted the steroids for personal use.

Appellant admitted being knowledgeable about steroids. He also admitted using steroids before joining the Air Force and admitted that he did not reveal his steroid use on his enlistment application.

Appellant testified that he met Stachum shortly after he moved into the security police dormitory. During the first month of his acquaintance with Stachum, they talked about weight lifting and body building, including use of steroids. Appellant testified that about a month after he moved into the dormitory, Stachum asked him if he "could hook him up with some drugs." Appellant responded that he did not know where to obtain them. Appellant testified that after that conversation, Stachum asked him about obtaining steroids in "probably almost every conversation." He testified that Stachum's initial requests did not bother him, but after a while, they became annoying, because he "had already told him no."

Appellant testified that after Hillhouse told him that he wanted to get rid of his steroids, appellant told Stachum that he could get him some steroids if he wanted them. Asked why he made the offer to Stachum, appellant responded, "To get him off my back and to do a favor for two friends."

On cross-examination, appellant corroborated Stachum's testimony that he insisted on completing the transaction on the evening of July 9. He admitted offering to "front part of the cost" of the drugs when Stachum said he did not have enough money. He admitted telling Hillhouse that he intended to share the steroids with Stachum.

Regarding his intent to share the steroids, appellant testified on cross-examination as follows:

> Q. Okay. And before you left, you told [Hillhouse] that you and Donnie [Stachum] were going to use the drugs that night? Isn't that true?
>
> A. Yes, ma'am.
>
> Q. Because you intended on using those drugs, didn't you?
>
> A. Yes, ma'am.
>
> Q. And, in fact, part of the deal that you were getting out of this is that Airman Stachum would

keep the drugs for you, and he would be able to provide them for you whenever you wanted to use them. Isn't that true?

A. For one week, ma'am.

Q. Right. And Airman Stachum would be the one who would actually have to have possession of them, isn't that true?

A. Yes, ma'am.

Q. So, then if for some reason the drugs were found, Airman Stachum—they would be in Airman Stachum's possession, isn't that true?

A. Yes, ma'am.

Q. And the whole time you intended on using those drugs. Isn't that true?

A. Yes, ma'am.

Q. So, part of the reason why you sold those drugs to Airman Stachum was so that you could use them. Isn't that true?

A. Yes, ma'am.

* * *

Q. And, in fact, after the transaction had finally taken place, on the way back to the gate, you told Airman Stachum that you guys were going to use the drugs that night. Isn't that true?

A. Yes, ma'am.

Q. Because that is the reason why you wanted this to go down was so you could use the drugs, isn't that true?

A. Yes, ma'am.

* * *

Q. Okay. Now, when you obtained those drugs from Airman Hillhouse, you were taking a pretty big risk, weren't you?

A. Yes, ma'am.

Q. Because you knew [Stachum] was a cop, right?

A. Yes, ma'am.

Q. And you did it because you were going to use those drugs, right?

A. In part, yes, ma'am.

A1C Richard Gilbert, appellant's friend and co-worker, was called as a defense witness. At an evidentiary hearing conducted in accordance with Article 39(a), UCMJ, 10 USC § 839(a), the defense established that Gilbert would testify as follows:

> I heard Airman Stachum ask Airman Hall, "can you hook me up." And that's all I heard. Then Airman Hall came out and said, "he keeps bugging me for steroids."

When asked when this conversation occurred, Gilbert responded, "Can't be specific, but I'd say between March and April." Gilbert also testified that appellant mentioned three or four times that Stachum kept "bugging him for steroids." In response to a question from the military judge about the context of the conversation between Stachum and appellant, Gilbert testified, "That's all I remember hearing, sir."

The military judge sustained a prosecution objection to Gilbert's testimony. He ruled that the statement about "hooking him up" was too remote and not trustworthy because Gilbert did not hear what else was said. Regarding appellant's complaint that Stachum was "bugging" him for steroids, the military judge ruled that it was "self-serving hearsay."

The Court of Criminal Appeals held that the military judge erred. The court held that Gilbert's testimony that Stachum asked appellant to "hook him up" was relevant to show that the suggestion to commit the offense originated with Stachum and to contradict Stachum's testimony that he never asked appellant to obtain drugs for him. The court further held that appellant's complaints about Stachum

"bugging" him were admissible as prior consistent statements under Mil.R.Evid. 801(d)(1)(B) and as evidence of appellant's state of mind under Mil.R.Evid. 803(3), Manual for Courts-Martial, United States (2000 ed.).[1] The court held, however, that the error was harmless because "appellant's own testimony established beyond a reasonable doubt not just that he had a predisposition to use steroids, but also that he had a predisposition to distribute the steroids." The court reasoned:

> Transferring the steroids from A1C [Hillhouse] to SrA Stachum was the means by which appellant would accomplish his goal—getting steroids for his own personal use. He even offered to front SrA Stachum $20 of the purchase price to make sure SrA Stachum made the purchase.[2]

54 M.J. at 792.

One judge dissented from the lower court's holding of harmless error, concluding, as did the majority, that the excluded testimony of A1C Gilbert went to the heart of appellant's entrapment defense. The dissenting judge concluded that the evidence showed appellant's predisposition to possess and use steroids, but did not establish his predisposition to distribute them. The dissenting judge was not satisfied beyond a reasonable doubt that the erroneous suppression of Gilbert's testimony was harmless. *Id.* at 793.

Discussion

Before this Court, the Government has not challenged the correctness of the decision below regarding the

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[1] All cited provisions from the Manual are unchanged from those in effect at the time of appellant's court-martial.

[2] The court below erroneously referred to A1C Gilbert as the source of the steroids instead of A1C Hillhouse.

admissibility of Gilbert's testimony. Thus, the sole issue before us is whether the court below correctly determined that any error in excluding Gilbert's testimony was harmless beyond a reasonable doubt.

Appellant asserts that because this case involved a swearing contest between Stachum and himself, excluding evidence relating to Stachum's credibility was an unconstitutional denial of the right to present an entrapment defense. He argues that the excluded portion of Gilbert's testimony would have corroborated his entrapment defense, and that there was a reasonable likelihood that Gilbert's testimony would have tipped the balance in his favor.

The Government argues that the exclusion of Gilbert's testimony was an evidentiary error that did not prevent appellant from presenting his entrapment defense. The Government further argues that appellant's own testimony "provided such clear evidence as to his predisposition that it virtually eliminated any entrapment defense." Thus, the Government asserts that, even if the error was of constitutional magnitude, it was harmless beyond a reasonable doubt.

We review the lower court's harmless-error analysis *de novo*. *See United States v. Grijalva*, 55 M.J. 223, 228 (2001) (*de novo* review of constitutional error); *United State v. Gunkle*, 55 M.J. 26, 30 (2001) (*de novo* review of nonconstitutional error). For constitutional errors, the Government must persuade us that the error was harmless beyond a reasonable doubt. *United States v. Adams*, 44 M.J. 251, 252 (1996), citing *Chapman v. California*, 386 U.S. 18, 24 (1967). For nonconstitutional errors, the Government must persuade us that the error did not have "a substantial influence on the findings." *Id.*, citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

Entrapment is an affirmative defense. RCM 916(g), Manual, *supra*, provides: "It is a defense that the criminal design or suggestion to commit the offense originated in the

Government and the accused had no predisposition to commit the offense." In *United States v. Whittle*, 34 M.J. 206, 208 (CMA 1992), this Court explained the burden of proof in entrapment cases as follows:

> The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime. Once the defense has come forward, the burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense, *United States v. Vandzandt*, [14 M.J. 332, 342-43 (CMA 1982)], "prior to first being approached by Government agents." *Jacobson v. United States*, [503 U.S. 540, 549 (1992)].

In *United States v. Howell*, 36 M.J. 354, 359-6(CMA 1993), this Court, quoting *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992), explained that the first element of entrapment is an inducement by government agents to commit the crime. This Court adopted the *Stanton* definition of an "inducement":

> Inducement is government conduct that "creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." . . . Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship." . . . Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and strategem.

(Citations and emphasis omitted.) This Court also explained that a government agent's repeated requests for drugs "do

not in and of themselves constitute the required inducement." *Id.* at 360.

In *United States v. Wind*, 28 M.J. 381, 382 (CMA 1989), this Court observed that evidence of drug possession or use to show predisposition to sell drugs is "questionable," because "[m]any people who possess or use drugs never sell them." However, this Court has stopped short of holding that possession or use of drugs is never, under any circumstances, relevant to show predisposition to distribute drugs.

A ruling excluding evidence is not constitutional error unless the evidence is "material or vital." *United States v. Ndanyi*, 45 M.J. 315, 321-22 (1996); *United States v. Garcia*, 44 M.J. 27, 31, *cert. denied*, 519 U.S. 865 (1996). Exclusion of evidence impeaching a key witness may be constitutional error if there is a "reasonable likelihood that the excluded evidence may have tipped the credibility balance in appellant's favor." *United States v. Bins*, 43 M.J. 79, 87 (1995); *see also United States v. Dorsey*, 16 M.J. 1, 7 (CMA 1983) (exclusion of evidence of motive to lie is constitutional error). The lower court treated the error in this case as constitutional error. We need not decide whether the lower court correctly characterized the error, because we are satisfied that the error was harmless beyond a reasonable doubt.

We evaluate prejudice from an erroneous evidentiary ruling under the four-pronged test set out in *United States v. Weeks*, 20 M.J. 22, 25 (CMA 1985). We weigh (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.

On the issue of entrapment, the Government's evidence was strong. The factual issue raised by appellant's entrapment defense was whether appellant was predisposed to facilitate a transfer of the drugs from Hillhouse to Stachum in order to ensure a no-cost supply of steroids for his own use. In this case, the Government was not required to show that appellant was generally predisposed to sell

drugs, but only that he was predisposed to facilitate this particular transaction. Hillhouse's testimony established that appellant was interested in obtaining steroids but had no money to buy them. Hillhouse's testimony also established that appellant offered to dispose of the steroids for him. Appellant's testimony indicated that he resisted whatever requests Stachum may have made for steroids, because he had no readily available source until Hillhouse approached him. Appellant's testimony on cross-examination established that appellant saw Hillhouse's desire to dispose of the steroids as an opportunity to obtain a source for his own use without having to pay for them.

In light of appellant's own testimony establishing his predisposition to facilitate the transfer of Hillhouse's steroids to Stachum, which was corroborated by Hillhouse's testimony and the uncontested portions of Stachum's testimony, we hold that any error in excluding portions of Gilbert's testimony was harmless beyond a reasonable doubt. Thus, we hold that the court below did not err.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

SULLIVAN, Senior Judge (concurring in part and in the result):

To the extent that the majority suggests we are precluded from looking at the holding of the Court of Criminal Appeals that error occurred, I disagree. We granted review of the question of harmless error, which under our precedent allows us to look at the question of error. *See United States v. Williams*, 41 M.J. 134, 135 n.2 (CMA 1994), citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). Moreover, we have not adopted a strict appellate waiver approach when an appellant fails to challenge an adverse Court of Criminal Appeals holding in this Court. *See generally* Eugene R. Fidell, *Guide to the*

Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, 34-37 (9th ed. 2000)(recognizing this Court's practice of specifying issues not assigned by appellate defense counsel); *see also United States v. Johnson*, 42 M.J. 443, 446 (1995). Finally, I am not convinced that the law of the case, rather than appellate forfeiture with a plain error exception, is the proper approach to these questions. *See generaliy United States v. Castillo*, 179 F.3rd 321, 326-27 (5th Cir. 1999); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3rd 735, 739-40 (D.C. Cir. 1995).

In my view, error occurred in this case for the reasons posited by the Court of Criminal Appeals. Nevertheless, I agree with the majority that such error was harmless beyond a reasonable doubt.

Whether Airman Stachum induced appellant to commit the charged offense, and Stachum's credibility in this regard, were not outcome determinative issues in this case. As pointed out by the majority, an additional requirement for a successful entrapment defense was a showing of an absence of a predisposition on appellant's part to commit the charged offense. See RCM 916(g), Manual for Courts-Martial, United States (1998 ed.).

I agree with the majority opinion that there was overwhelming evidence of appellant's predisposition to acquire drugs from A1C Hillhouse in this case. In these circumstances, there was no reasonable possibility that the members would find the second prerequisite of this defense existed in appellant's case. Accordingly, I conclude that error in excluding defense evidence on Stachum's purported inducement of appellant and Stachum's credibility was harmless beyond a reasonable doubt. *See United States v. Monroe*, 42 M.J. 398, 402-03 (1995).

EFFRON, Judge (dissenting):

As the Court of Criminal Appeals noted, the military judge erroneously excluded testimony that went "directly to the heart of the appellant's entrapment defense." 54 M.J. 788,

792 (2001). The court concluded that the error was not prejudicial under Article 59(a), UCMJ, 10 USC § 859(a). *Id.* The sole issue before us in the present appeal is the question of prejudice. The majority opinion concludes that any error was harmless beyond a reasonable doubt. __ M.J. at (12). I respectfully dissent.

As our Court has emphasized, "an accused has a tough row to hoe to secure acquittal by virtue of entrapment because '[a] law-abiding person is one who resists the temptations, which abound in our society today, to commit crimes.'" *United States v. LeMaster*, 40 M.J. 178, 180 (CMA 1994) (quoting *United States v. Whittle*, 34 M.J. 206, 208 (CMA 1992)). That task becomes particularly daunting if the military judge denies the accused the opportunity to present evidence that goes "to the heart" of his or her entrapment defense.

In an entrapment case, the determination as to whether an accused was entrapped is a subjective inquiry that "must be resolved by the fact finder." *United States v. Vanzandt*, 14 M.J. 332, 343 (CMA 1982). The issue of entrapment "involves balancing the accused's resistance to temptation against the amount of government inducement." *Id.* at 344. Because this is a factual issue, our resolution of the present appeal does not turn on whether we would believe appellant's version of the events, *see United States v. Wells*, 52 M.J. 126, 131 (1999), or whether the evidence was sufficient as a matter of law. *Compare Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The issue we must resolve is "whether the error had a substantial influence on the findings." *United States v. Adams*, 44 M.J. 251, 252 (1996) (articulating standard for nonconstitutional errors) (citations omitted); *see also United States v. Jefferson*, 13 M.J. 1, 4 (CMA 1982) (test for harmless error under constitutional standard is "whether 'evidence in the record of trial demonstrates beyond a reasonable doubt that the unadmitted testimony would not have tipped the balance in favor of the accused and the evidence of guilt is so strong as to show no reasonable possibility of prejudice.'") (citation omitted).

The majority opinion contends that the Government's evidence was "strong" on the question of entrapment, relying principally on the claim that "Hillhouses's testimony established that appellant was interested in obtaining steroids but had no money to buy them," to show predisposition. __M.J. at (13). The majority opinion also relies on the contention that appellant's testimony demonstrates that he resisted Stachum's repeated requests for steroids only because he did not have a source to supply Stachum until Hillhouse approached him. *Id.* The evidence, however, raises more than a reasonable doubt on a number of key points.

First, with respect to Hillhouse, who testified under a grant of immunity, his testimony is quite ambiguous on the issue of whether — at the time of the controlled buy or any other time — appellant was interested in buying steroids but had no money to do so. On direct examination, Hillhouse testified as follows:

> Q: Before you left for Washington, did you ever have a conversation with the accused about steroids?
>
> A: Quite frequently.
>
> Q: What were these conversations about?
>
> A: They were just basic questions and basic conversations to the effect that do you know the pros and cons—pretty much what they [steroids] can do for you.
>
> * * *
>
> Q: Did you ever have a conversation with him about what you were going to do when you go to Washington?
>
> A: The only thing I would be able to recall is I would attempt to purchase them [steroids]. I by no means knew for sure if I was going to.
>
> Q: So, you told the accused that you were going to try to buy some steroids?

A: Yes.

Q: And what did he say in response to that?

A: Really not too much. And if he had money, he would probably want me to buy some. I don't have the 100% prove [*sic*] on that though.

(Emphasis added.) This testimony does not establish beyond a reasonable doubt that appellant lacked sufficient funds to purchase steroids. At most, it indicates that appellant may not have had the necessary funds prior to the time Hillhouse purchased the steroids on June 16 while in Washington state. The testimony does not directly address appellant's ability to purchase the steroids on July 9, the date of the controlled buy.[3*]

Second, appellant's testimony does not establish beyond a reasonable doubt that his resistance to Stachum's inducement was based solely on the fact that he did not have a source to fulfill Stachum's request. Although such a conclusion is one possible inference that could be drawn from the evidence, appellant's testimony does not establish this fact beyond a reasonable doubt. The Government did not prove that, absent Stachum's three-month campaign of inducement, or prior thereto, appellant nonetheless would have engaged in the criminal conduct for which he was convicted, illegal distribution of steroids, in order to obtain steroids for his own personal use. *See Jacobson v. United States*, 503 U.S. 540, 549 n.2 (1992).

[3*] It is noteworthy as well that appellant did not testify as to his ability (or inability) to pay the $120 to purchase Hillhouse's leftover steroids, nor did trial counsel inquire about this matter on cross examination. Moreover, trial counsel did not proffer any other evidence on this point. Equally telling is the fact the Government's brief does not rely on appellant's purported inability to pay to show predisposition. *See* Government Brief at 15 (arguing only that appellant was motivated by a desire "to obtain [steroids] for his own use"). As defense counsel noted in his closing argument at trial, "There's no evidence that Airman Hall couldn't have gone out and bought those steroids just for himself."

Appellant's admission that he sold the steroids in part so that he could use them is not dispositive. *See United States v. Eckhoff*, 27 M.J. 142, 144 (CMA 1988) (holding "that a profit motive does not automatically negate an entrapment defense"). Accordingly, a drug user who is motivated in part by a desire to use drugs, or who otherwise benefits from a transaction, does not forfeit the entrapment defense. The prosecution must still demonstrate that such a person would have acted in the absence of the Government's inducement or conceived the idea "prior to first being approached by Government agents." *United States v. Howell*, 36 M.J. 354, 358 (CMA 1993) (quoting *Jacobson*, *supra* at 549) (emphasis added).

Consistent with this requirement, we have acknowledged that profit motive may be considered as one factor in determining whether an accused was predisposed to commit the charged crime, but we have not held that the presence of such motive precludes the defense. *See, e.g.*, *United States v. Cooper*, 35 M.J. 417, 425 (CMA 1992) (profit motive identified as one of five factors to show predisposition); *United States v. Bell*, 38 M.J. 358, 360 (CMA 1993) ("unquestionably, the entrapment defense was raised by appellant's own testimony," though appellant profited from transaction); *United States v. Bailey*, 21 M.J. 244, 245 (CMA 1986) (guilty plea improvident and entrapment defense raised where appellant gained profit from illegal distribution). In *Howell*, *supra*, we relied upon federal civilian opinions that have similarly identified profit motive as one among several factors that may be considered when assessing predisposition. *See United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) (identifying five "factors relevant in determining predisposition," including character, whether the Government first suggested the illegal conduct, and profit motive); *United States v. Skarie*, 971 F.2d 317, 320 (9th Cir. 1992) (same); *see also United States v. Martinez*, 122 F.3d 1161, 1163 (9th Cir. 1997) (holding "none of [five] factors is controlling" as to predisposition, including profit motive);

United States v. Miller, 71 F.3d 813, 816 (11th Cir. 1996) (noting prior decisions have "refused to enumerate a list of factors to address when a defendant's predisposition is at issue because the inquiry ... is necessarily ... fact-intensive").

The predicate factual issue in this case is whether the Government's inducement set off the chain of events which led to appellant's participation in the sale of steroids on July 9, the resolution of which includes assessing whether appellant sufficiently "resist[ed] ... temptation against the amount of government inducement" to warrant acquittal. *Vanzandt*, 14 M.J. at 344. The Court of Criminal Appeals held that Gilbert's testimony was admissible as a prior consistent statement to rebut the Government's attack on appellant's truthfulness on cross-examination, as evidence of appellant's state of mind, and to impeach Stachum, who claimed never to have asked appellant for steroids. All of these reasons constitute factors that bear directly upon the issue of appellant's predisposition. As the members were presented only with the testimony of appellant and Stachum on the entrapment question, resolution of this question turned entirely on credibility. Under these circumstances, the exclusion of Airman Gilbert's testimony was prejudicial because it deprived the defense of the opportunity to have the credibility question resolved by the members.

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JASON W. HALL
United States Air Force

ACM 33476

5 February 2001

54 M.J. 788

Sentence adjudged 18 September 1998 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Gregory E. Michael.

Approved sentence: Confinement for 12 months and reduction to E-1.

Appellate Counsel for Appellant: Colonel Theodore J. Fink and Captain Natasha V. Wrobel.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, and Captain Melissa A. Burke.

Before

YOUNG, BURD, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

In accordance with his pleas, the appellant was convicted of two specifications of assault and one specification of failure to obey an order. Articles 128 and 92, UCMJ, 10 U.S.C. §§ 928, 892. Contrary to his plea, the appellant was convicted of wrongful distribution of a controlled substance. Article 112a, UCMJ, 10 U.S.C. § 912a. The convening

authority approved the sentence adjudged by the court members: confinement for 12 months and reduction to E-1. The appellant claims the military judge erred by denying "the defense the right to call a material witness precluding the appellant from presenting a defense." We affirm.

The military judge did not preclude the witness from testifying. The judge merely made evidentiary rulings excluding portions of his testimony. We suspect the appellant framed the issue as a denial of a material witness to get the benefit of a more stringent harmless error test. If we were to conclude that the military judge inappropriately denied a material and relevant defense witness, the appellant's conviction would have to be reversed unless we are convinced beyond a reasonable doubt that the error was harmless. *United States v. Miller*, 47 M.J. 352, 359-60 (1997). However, this Court reviews a trial judge's rulings to admit or exclude evidence for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (1995). *See United States v. Kindle*, 45 M.J. 284, 285 (1996) (holding standard of review for admissibility of out of court statement is whether judge abused his discretion). Although we are authorized to find facts under Article 66(c), 10 U.S.C. § 866(c), we normally defer to the military judge unless his findings are clearly erroneous. *See United States v. Vaughters*, 42 M.J. 564, 566 (A.F. Ct. Crim. App. 1995), *aff'd*, 44 M.J. 377 (1996). We review his conclusions of law de novo. *Ayala*, 43 M.J. at 298. We may not reverse unless an error "materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a).

I. Background

From defense counsel's opening statement, the defense admitted that the appellant provided steroids to Senior Airman (SrA) Stachum, a government agent. But, the defense counsel insisted the appellant was not guilty of a criminal offense because he was entrapped. The defense counsel alleged the idea to transfer the steroids originated

with SrA Stachum and the appellant was not predisposed to commit the offense.

SrA Stachum testified that he was a member of the Security Forces and a reserve police officer with the Mountain Home Police Department. He met the appellant while performing his police duties both on and off base, but they came to know each other personally only when the appellant moved into the Security Forces dormitory where SrA Stachum lived. Both airmen were weightlifters and their relationship revolved around that mutual interest. They had numerous conversations about techniques, supplements, and even steroids. The appellant even loaned SrA Stachum a book on steroids. Ultimately, their conversations turned to obtaining steroids. According to SrA Stachum, the appellant said "he could probably connect me with a source." SrA Stachum contacted the Air Force Office of Special Investigations (AFOSI) about the appellant's interest in steroids, and the AFOSI opened an investigation. On cross-examination, SrA Stachum insisted that he had never asked the appellant to get him steroids and that the plan to obtain steroids originated with the appellant.

Airman (Amn) Hillhouse, another weightlifter, told the appellant that he intended to purchase steroids while on leave. The appellant said that he would want to get some if he had the money. Amn Hillhouse purchased $300-worth of steroids for his personal use while on leave in Washington, although he was unfamiliar with how to use them. Knowing, as did many others on base, that the appellant had used steroids before entering the Air Force, Amn Hillhouse took the steroids to the base and sought the appellant's advice on how to correctly use them. The appellant taught Amn Hillhouse how to inject himself with the steroids. After a little over two weeks, Amn Hillhouse became disillusioned with the steroids—he did not seem to be making any progress on adding muscle to his body and the steroids made him very irritable. He offered the remainder of the steroids

to the appellant. The appellant told Amn Hillhouse he would pay $120 for the steroids. His plan was to sell the steroids to SrA Stachum with the understanding that he could use some of them during the first week after the sale. The appellant took the steroids and sold them to SrA Stachum for the same price.

When the appellant testified, he readily admitted using steroids before he entered the Air Force. He acknowledged selling the steroids to SrA Stachum, but claimed that he only transferred the steroids as a favor for two friends (Amn Hillhouse and SrA Stachum) and to get SrA Stachum to stop pestering him about steroids. He asserted that the idea to provide the steroids originated with SrA Stachum. On cross-examination, the appellant admitted he had offered to front SrA Stachum $20 to assist him in purchasing the steroids and that he intended to share the steroids with SrA Stachum. The appellant also conceded that he had lied to several of his supervisors about prior misconduct.

II. Discussion

Airman First Class (A1C) Gilbert lived in the same dormitory as the appellant and SrA Stachum. The appellant called A1C Gilbert to testify that he had heard SrA Stachum ask the appellant "can you hook me up with steroids?" and that, prior to the appellant's apprehension, the appellant had complained on several occasions about SrA Stachum pestering him for steroids. The prosecution objected to the testimony as inadmissible hearsay, and the military judge held an Article 39(a) session to determine whether A1C Gilbert's testimony should be limited. During the Article 39(a) session, A1C Gilbert testified that he overheard SrA Stachum ask the appellant if he could "hook him up," but did not hear the word steroids. Immediately thereafter, however, the appellant complained to A1C Gilbert that SrA Stachum kept bugging him about steroids. The appellant complained on several other occasions to A1C Gilbert about SrA Stachum pestering him to get steroids.

The defense theory at trial was the statements were not hearsay because they were not offered for the truth of the matter asserted. Instead, the defense asserted the statements were admissible to impeach SrA Stachum by contradicting his testimony. The defense also claimed that the prosecution attacked the appellant's credibility during cross-examination and, therefore, A1C Gilbert's testimony was admissible under Mil. R. Evid. 801(d)(1)(B) to rebut a charge of recent fabrication.

The military judge permitted A1C Gilbert to testify, but limited his testimony. The military judge found the "can you hook me up" statement to have marginal relevance, but excluded it because it was too remote and lacked trustworthiness—the witness was not sure about what he heard and did not hear any other part of the conversation. The military judge ruled the appellant's statements to A1C Gilbert about SrA Stachum pestering him about getting him steroids were self-serving hearsay, and therefore, inadmissible.

Before this Court, the appellant reiterates his claim that the statements were not inadmissible hearsay. He again argues that the statements should be admitted, not for the truth of the matter asserted in the statements, but to contradict SrA Stachum's testimony. He now asserts that the appellant's statements to A1C Gilbert that SrA Stachum kept bugging him were admissible as expressions of the appellant's state of mind under Mil. R. Evid. 803.

Relevant evidence is generally admissible except as otherwise provided by law or the Military Rules of Evidence. Mil. R. Evid. 402. Evidence is relevant if it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Of course, the military judge may exclude even logically relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Mil. R. Evid. 403.

The appellant contends he was entrapped into distributing the steroids. Entrapment is a defense to the offense of distribution of controlled substances. R.C.M. 916(g). *See United States v. Monroe*, 42 M.J. 398 (1995). The appellant has the initial burden of showing that a government agent originated the suggestion to commit the offense. The burden then shifts to the prosecution "to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense, 'prior to first being approached by Government agents.'" *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992) (citations omitted). *Accord Monroe*, 42 M.J. at 402.

The Military Rules of Evidence do not expressly mention impeachment by specific contradiction. It is a common law mode of impeachment recognized in federal and military courts, and not governed by Mil. R. Evid. 608. *United States v. Sojfer*, 47 M.J. 425, 427 (1998) (citing *United States v. Toro*, 37 M.J. 313, 315 (C.M.A. 1993)); *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995). The rules of relevancy apply to methods of impeachment. *Sojfer*, 47 M.J. at 427.

Under the common law, a witness could not be impeached with extrinsic evidence of collateral facts. 1 John W. Strong et al., *McCormick on Evidence* § 45 (5th ed. 1999). The same rule applies under the Military Rules of Evidence, but is normally couched in terms of Mil. R. Evid. 403. The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *United States v. Baldwin*, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (citing Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 490 (4th

ed. 1984)). However, when impeachment by contradiction is logically relevant, it is presumptively admissible under Mil. R. Evid. 402. 1 Strong, *supra* at § 45.

A1C Gilbert's testimony, that SrA Stachum asked the appellant to hook him up, was logically relevant—it had a tendency to demonstrate that the suggestion to commit the offense originated with SrA Stachum and to contradict SrA Stachum's testimony that he never asked the appellant to get him steroids. It goes directly to the heart of the appellant's entrapment defense. Such testimony is neither remote, nor collateral. The military judge's conclusion that the evidence was untrustworthy was a matter better left for the court members to assess. *See* Saltzburg, *supra* at 947.

A1C Gilbert's testimony that, immediately after SrA Stachum asked the appellant to hook him up, the appellant complained about SrA Stachum asking him to get steroids was admissible. During cross-examination of the appellant, the trial counsel questioned the appellant about previous lies to superiors and having a lot to lose in the court-martial. She suggested to court members that the appellant had a strong motive to testify falsely. Under these circumstances, A1C Gilbert's testimony describing the appellant's statement was not hearsay, but a prior consistent statement offered to rebut a motive to misrepresent. Mil. R. Evid. 801(d)(1)(B). The appellant's statement to A1C Gilbert also described his state of mind. Although the appellant did not seek admission at trial on this ground, the statement would have been admissible as an exception to the hearsay rule. Mil. R. Evid. 803(3). The fact that the statement was self-serving is not a grounds to bar admission under the rule. *United States v. Benson*, 48 M.J. 734, 741 (A.F. Ct. Crim. App. 1998).

Although the military judge erred in refusing to admit this evidence, this error does not warrant reversal of the appellant's conviction. The appellant's own testimony established beyond a reasonable doubt not just that he had a predisposition to use steroids, but also that he had a

predisposition to distribute the steroids. The appellant freely admitted wanting to purchase the steroids from A1C Gilbert for his own personal use, but not having the money to do so. Transferring the steroids from A1C Gilbert to SrA Stachum was the means by which the appellant would accomplish his goal—getting steroids for his own personal use. He even offered to front SrA Stachum $20 of the purchase price to make sure SrA Stachum made the purchase. Under these circumstances, the military judge's suppression of A1C Gilbert's testimony was harmless error. Article 59(a), UCMJ.

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

PECINOVSKY, Judge (Concurring in part and dissenting in part):

I concur that the military judge erred in refusing to admit the testimony of A1C Gilbert concerning whether SrA Stachum asked appellant to provide him with steroids. A1C Gilbert would have testified that he overheard SrA Stachum ask appellant if he could "hook him up." Such testimony should have been admitted to impeach the testimony of SrA Stachum that he never asked appellant to provide him with steroids.

In addition, A1C Gilbert should have been permitted to testify that appellant complained to A1C Gilbert that SrA Stachum kept bugging appellant about obtaining steroids. A1C Gilbert's testimony would not have been hearsay, but, rather, would have constituted a prior consistent statement offered to rebut a motive to misrepresent, as well as a description of appellant's state of mind.

However, I dissent from the majority's conclusion that the military judge's suppression of A1C Gilbert's testimony was harmless error. The majority states that the testimony of

the appellant established beyond a reasonable doubt that appellant had a predisposition to commit the offense. This would be true for the offense of use or possession of steroids. However, appellant was charged with and found guilty of the distribution of steroids. Our superior court has held that evidence of use or possession of drugs to show predisposition to sell drugs is "questionable." *United States v. Wind*, 28 M.J. 381, 382-83 (C.M.A. 1989) ("Many people who possess or use drugs never sell them; and so some courts have held that, if an accused is tried for selling drugs and asserts an entrapment defense, evidence of his prior use or possession is inadmissible to establish his predisposition." *See, e.g., United States v. Watson*, 489 F.2d 504 (3d Cir. 1973); *United States v. Ewbank*, 483 F.2d 1149 (9th Cir. 1973); *United States v. Venus*, 15 M.J. 1095 (A.C.M.R. 1983)).

The majority correctly notes that appellant used steroids prior to coming into the Air Force. However, no evidence was admitted to indicate that appellant had ever distributed steroids prior to his entry into the Air Force. Such evidence of a prior incident of drug distribution by appellant would have been admissible under Mil. R. Evid. 404 to show why the government witness approached appellant to buy drugs and to rebut any suggestion that appellant was entrapped by that same government witness. *See United States v. Acosta*, 49 M.J. 14, 19 (1998).

It is clear from the record of trial that appellant was in possession of a small amount of anabolic steroids. However, possession of a small amount of illegal drugs is insufficient to show predisposition to sell. *See United States v. Hunt*, 34 M.J. 765, 768 (A.C.M.R. 1992); *United States v. Venus*, 15 M.J. 1095 (A.C.M.R. 1983); *United States v. Lubitz*, 34 M.J. 9 (C.M.A. 1991) (summary disposition).

Although not mentioned by the majority, appellant's possession of an anabolic steroid guide may be considered evidence of a predisposition to use or possess steroids. Appellant testified that he acquired the guide through an ad

in Muscle magazine and used it to write a paper on the pros and cons of the use of steroids. Appellant certainly knew how to use steroids and did use them prior to entering the Air Force.

Similarly, the seizure of the gel caps and the syringes may be evidence of a predisposition to use steroids. According to the immunized testimony of Amn Hillhouse, appellant purchased the gel caps and syringes along with the steroids during the controlled buy on 9 July 1998. However, the controlled buy did not take place until after the suggestion of the purchase was first raised either by the appellant or SrA Stachum.

Appellant admitted that he would have purchased steroids for his own use had he the money to do so. As with his pre-Air Force use of steroids, this testimony simply evidences appellant's predisposition to possess and use steroids, not to distribute them. The majority notes that even when appellant distributed the steroids to SrA Stachum, he did so for the purpose of being able to use some of them himself. I disagree with the majority's statement that the testimony of the appellant established beyond a reasonable doubt that appellant had a predisposition to commit the offense of distribution of steroids. Appellant had the predisposition to possess and use steroids. The appellant, by his own admission, wanted to use steroids. However, the issue of whether the appellant had a predispositon [sic] to distribute steroids is not established beyond a reasonable doubt by the testimony of appellant, given the impeaching nature of A1C Gilbert's testimony to the statements concerning inducement by the government agent, SrA Stachum.

The defense of entrapment arises when "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." Rule for Courts-Martial (R.C.M.) 916(g). At trial, the question of appellant's predisposition to distribute had, as its focus, the question of who first raised the issue of

the purchase of the steroids by appellant for SrA Stachum. Appellant testified that SrA Stachum continually asked him to provide him with steroids. SrA Stachum testified that he never asked appellant to provide steroids.

Due to the suppression of A1C Gilbert's testimony, the crucial issue in the case rested upon a swearing contest by appellant and SrA Stachum. In trial counsel's closing argument, he emphasized that, when comparing the testimony of appellant and SrA Stachum, the only credible evidence is SrA Stachum telling the court members the truth and the idea to sell the steroids began with the appellant. Entrapment questions frequently turn on the factfinders' assessment of witness credibility. *See United States v. Collier*, 1 M.J. 358 (C.M.A. 1976); *United States v. Jursnick*, 24 M.J. 504 (A.F.C.M.R. 1987); *United States v. O'Donnell*, 22 M.J. 911 (A.F.C.M.R. 1986). Here, the members rejected the entrapment defense, apparently believing the testimony of the government agent over that of the accused. The testimony of A1C Gilbert, impeaching the testimony of SrA Stachum and corroborating appellant's testimony, in the words of the majority opinion, "goes directly to the heart of the appellant's entrapment defense." Given the importance of such evidence, I cannot concur with the majority's conclusion that "the military judge's suppression of A1C Gilbert's testimony was harmless error" under Article 59(a), UCMJ.

The military judge erred in suppressing the testimony of A1C Gilbert, which went "to the heart of the appellant's entrapment defense." This error "materially prejudice[d] the substantial rights of the accused." Article 59(a), UCMJ. Given the crucial nature of this evidence to the issue of whether appellant had a predisposition to distribute steroids or whether he was entrapped by the actions of a government agent, the suppression of such evidence constituted harmful error.

Additionally, in reviewing the record for factual sufficiency, I am not convinced of appellant's guilt beyond a

reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The majority has held that the testimony of A1C Gilbert was erroneously suppressed. A review of the record, pursuant to Article 66(c), UCMJ, 10 U.S.C. § 816, necessarily includes a review of the admitted evidence, as well as the erroneously suppressed evidence, to determine factual sufficiency. Although *Turner* and Article 66(c) do not address the issue of what constitutes a "record," *Turner* is clear that, pursuant to the fact-finding power conferred upon a service court of appeals, Article 66(c) "requires that court to evaluate not only the sufficiency of the evidence but also its weight." *Turner*, 25 M.J. at 325. Therefore, where this court has held that evidence was erroneously surpressed at trial, it is required for this court to make "an explicit finding as to whether from their review of the record [including the suppressed evidence] they are convinced beyond a reasonable doubt of appellant's guilt." *See id.* I am not convinced of guilt beyond a reasonable doubt.

Finally, the majority analyzes this case under an abuse of discretion standard, rather than applying the "harmless error beyond a reasonable doubt" due errors rising to a constitutional level. The majority concedes that "[i]f we were to conclude that the military judge inappropriately denied a material and relevant defense witness, the appellant's conviction would have to be reversed unless we are convinced beyond a reasonable doubt that the error was harmless. *United States v. Miller*, 47 M.J. 352, 359-60 (1997)." In *Miller*, our superior court relied upon their earlier decision in *United States v. Brown*, 41 M.J. 1, 4 (C.M.A. 1994), in which the court set forth the standard as to when to apply the "beyond a reasonable doubt" standard to a harmless error analysis. In *Brown*, the court found that the military judge's erroneous evidentiary ruling precluded appellant from presenting a defense based on evidence of pertinent character traits under Mil. R. Evid. 404(a)(1). Id. The court emphasized that "[t]his was an error of Constitutional dimension, going to the heart of appellant's defense. We are

unable to conclude beyond a reasonable doubt that the error was harmless." *Brown*, 41 M.J. at 4. (emphasis added).

Just as the denial of a material witness (*Miller*) or prevention from introducing evidence of pertinent character traits (*Brown*) constitute errors of Constitutional dimension, here, the erroneous suppression of vital testimony of A1C Gilbert, goes "to the heart of the appellant's entrapment defense." *See Brown*, 41 M.J. at 4. Such an error is, therefore, "an error of Constitutional dimension" requiring this court to determine whether "beyond a reasonable doubt ... the error was harmless." *Id.* Applying the proper standard of harmful error beyond a reasonable doubt, I would hold that the erroneous suppression of the testimony is not harmless beyond a reasonable doubt.

I, thereby, respectfully dissent and would reverse the conviction for distribution of steroids.

OFFICIAL

//s//
LAURA L. GREEN
Clerk of Court